A

KERAJAAN MALAYSIA

v.

AMBANK (M) BHD

B

HIGH COURT MALAYA, KANGAR
ZAMANI RAHIM JC
[CRIMINAL APPEAL NO: 41-14-08]
18 JUNE 2009

C ***CRIMINAL LAW:*** *Immigration Act 1959/63 - Section 56(1)(d) - Harbouring illegal immigrants in motorcar - Whether motorcar must mandatorily be forfeited - Whether seizure and detention of motorcar defective in law - Immigration Act 1959/63 s. 49A(1), (3), (5)*

D A police sergeant, Roslan bin Mansor, a member of the Unit Pencegah Penyeledupan (UPP) had arrested one Iredzardy bin Mat Radzi, being the driver of the motorcar, WFN 7409, for harbouring four illegal immigrants in the said motorcar. Iredzadry was then charged at the Magistrate Court for an offence under

E s. 56(1)(d) of the Immigration Act 1959/63. Investigations revealed that the said motorcar, WFN 7409, was registered in the name of the said Iredzardy, but ownership of the said motorcar was claimed by Ambank (M) Sdn Bhd, the respondent. The said motorcar was, on 6 May 2004, hired by the respondent to the

F said Iredzadry under a Hire and Purchase Agreement. The respondent was not aware that the said motorcar was detained by the police for an offence of harbouring illegal immigrants by the accused. The learned deputy submitted that as motorcar WFN 7409 had been used to harbour illegal immigrants contrary to the

G Immigration Act and its driver, Iredzardy bin Mat Radzi was found guilty after a trial and convicted, the said motorcar must mandatorily be forfeited under s. 49A of the Immigration Act 1959/63. The respondent, however, contended that from the outset, the seizure and detention of the said motorcar under

H s. 49A(1) was defective in law, therefore the specific provision of s. 49A was inapplicable. The respondent argued that the said motorcar should be returned to the respondent as it was the 'owner' and Iredzardy was the 'hirer' by virtue of the Hire Purchase Act 1967.

I

Held:

(1) The seizure and detention of the said motorcar WFN 7409 was not carried out by the Director General or any senior immigration officer authorized by the Director General in writing under s. 49A(1), but instead by the police sergeant, Roslan bin Mansor. There was a clear non-compliance of the seizure provision of s. 49A(1). Any order of forfeiture would clearly be against the rules of strict or restrictive construction of s. 49A(1) and therefore bad in law. (para 15)

(2) Section 49A(5) deals with an order for forfeiture or for the release of any vehicle, notwithstanding that no person may have been convicted of the offence. The word 'shall' in sub-s. 5 need not necessarily mean that forfeiture must be made in all cases because an option or an alternative order for the release of the vehicle was also available to the court. Thus, to say that only the order of forfeiture can be made was against the clear words of the statute. In this case, there was a conviction on one Iredzardy bin Mat Radzi. The appropriate forfeiture provision is provided in sub-s. 3 which uses the phrase 'shall be liable'. It had been decided that such phrase 'shall be liable' was not mandatory. It was discretionary. (paras 16 & 17)

(3) As the seizure and detention of the motorcar, WFN 7409, was not in accordance with the provision in s. 49A(1) and improper, there could be no forfeiture order, as to do so was clearly bad in law. The said motorcar, in the circumstances of this, was rightly released by the learned magistrate to Ambank Sdn Bhd, the respondent, who claimed ownership thereof. (para 19)

[Order accordingly.]

Case(s) referred to:

Leong Kok Huat v. PP [1998] 4 CLJ 106 HC ***(refd)***

Marathaeir Sangulullai & Anor v. Syarikat JG Containers (M) Sdn Bhd & Anor [2003] 2 CLJ 96 CA ***(refd)***

Ngeranter Ripai v. PP [1990] 2 CLJ 273; [1990] 2 CLJ (Rep) 530 HC ***(refd)***

PP v. Chu Beow Hin [1982] CLJ 110; [1982] CLJ (Rep) 288 FC ***(refd)***

Legislation referred to:
Commercial Vehicle Licensing Board Act 1987, ss. 33, 51(1), (3)
Criminal Procedure Code, s. 407
Immigration Act 1959/63, ss. 49A(1), (3), (5), 49A, 55D, 56(1)(d)

For the appellant - Noor Shazwani DPP
For the respondent - Noor Shazwani (mention on behalf of); M/s Burhan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Zamani Rahim JC:

[1] One Iredzardy bin Mat Radzi was charged at the Magistrate Court, Kangar for an offence under s. 56(1)(d) of the Immigration Act, 1959/63 (Amendment 2002) and the charge reads as follows:

> Bahawa kamu bersama-sama pada 22.9.2004 jam lebih kurang 7.15 pagi di Jalan Mini Tar Kampung Sena Titi Tinggi Padang Besar, di dalam Daerah Kangar, di dalam Negeri Perlis telah didapati memberi perlindungan kepada pendatang asing tanpa izin dengan membawa masuk 4 orang lelaki warganegara Myanmar menggunakan kenderaan pendaftaran no. WFN 7409 iaitu: 1) Kyaw Nyunt, 2) Maung Tun, 3) Aung Aung dan 4) Maung Maung Myint. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 56(1)(d) Akta Imigresen 1959/63 pindaan 2002 dan boleh dihukum di bawah seksyen 56(1)(bb) Akta yang sama.

[2] The accused was found guilty, convicted and sentenced to a fine of RM50,000 in default seven months imprisonment. The accused did not pay the fine. No order of forfeiture of the motorcar, WFN 7409 was made by the magistrate then.

[3] Subsequently on 3 March 2006, an inquiry was conducted with a view to determine the fate of the motorcar, WFN 7409. The facts of the case as ascertained in the inquiry were this. A police sergeant, Roslan bin Mansor who was a member of the Unit Pencegah Penyeludupan (UPP), Chuping had arrested one Iredzardy bin Mat Radzi, being the driver of motorcar, WFN 7409 for harbouring four illegal immigrants in the said motorcar. The case was investigated by another police sergeant, Hassan bin Abdullah. His investigation revealed that the said motorcar, WFN 7409 was registered in the name of the said Iredzardy, but

ownership of the said motorcar was claimed by the Ambank (M) Sdn Bhd, the respondent. The respondent was notified in writing of the inquiry scheduled to be held on 3 March 2006.

[4] The said motorcar was, on 6 May 2004 hired by the respondent to the said Iredzardy under Hire and Purchase Agreement dated (illegible) (see pp. 65 to 73 record of inquiry). Since hiring the said motorcar, its monthly instalments for about 50 months was never paid by the said Iredzardy. The amount outstanding as at 23 March 2006 was in the sum of RM29,877.14 (see at p. 74 record of inquiry). The said motorcar was hired for personal use only. The respondent was not aware that the said motorcar was detained by the police for an offence of harbouring illegal immigrants by the accused. The registration card of the said motorcar carried the endorsement that ownership of the said motorcar was claimed by the respondent.

[5] The learned deputy submitted that as motorcar, WFN 7409 had been used to harbour illegal immigrants contrary to the Immigration Act and its driver, Iredzardy bin Mat Radzi was found guilty after a trial and convicted, the said motorcar must mandatorily be forfeited under s. 49A.

[6] The learned counsel for the respondent contended that from the outset the seizure and detention of the said motorcar under s. 49A(1) was defective in law. Therefore, the specific provision of s. 49A was inapplicable. Neither the general provision of s. 407 of the Criminal Procedure Code for the disposal of the exhibits applies as its application is subject to any special provisions relating to forfeiture contained in any written law under which the conviction was had. The learned counsel went on to argue that the said motorcar should be returned to the respondent as it was the 'owner' and Iredzardy bin Mat Radzi was the 'hirer' by virtue of the Hire Purchase Act, 1967. Thus, the release of the motorcar to the respondent was proper. If the sanctity of the hire purchase agreement was not honoured, the commercial arrangements or transactions would not be efficacious. It would be chaotic.

[7] The specific provision in the Immigration Act which deals with forfeiture is found in s. 49A. It provides as follows:

> **49A. Power to seize, detain and forfeit vessels, vehicles or aircraft.**
>
> (1) Any vessel, vehicle or aircraft which is used or in respect of which there is reasonable cause to suspect that is has been or that it is about to be used in the commission of any offence against this Act may be seized and detained by the Director General or any senior immigration officer, authorized in that behalf by the Director General in writing under his hand, at any place either on land or in the territorial waters of Malaysia.
>
> (2) The seizing officer shall forthwith give notice in writing of the seizure and the grounds thereof to the owner, charterer or agent of the vessel, vehicle or aircraft so seized or detained, either by delivering the notice to him in person or by post at his place of office or abode, if known:
>
> Provided that no notice shall be required to be given where the seizure of detention is made in the presence of or with the knowledge of the offender or the owner or his agent, as the case may be.
>
> (3) Any vessel, vehicle or aircraft liable to seizure or detention under subsection (1) shall be liable to forfeiture.
>
> (4) An order for the forfeiture or for the release of any vessel vehicle or aircraft liable to forfeiture under this section shall be made by the court before which the prosecution with regard thereto has been held.
>
> (5) An order for the forfeiture of any vessel vehicle or aircraft shall be made if it is proved to the satisfaction of the court that an offence against this Act has been committed and that the vessel was used in the commission of the offence.
>
> (6) The Director General may sell any vessel vehicle or aircraft forfeited under this section. The proceeds of the sale shall, after payment of the expenses of the sale, be applied in payment of any fine, costs or charge incurred under this Act and any balance remaining shall be paid into the Consolidated Fund.

[8] There is another provision that is, s. 407 of the Criminal Procedure Code which provides the court's power to order forfeiture which is subject to any special provisions relating to forfeiture contained in the written law under which the conviction

was made. Section 407 is a general provision in the general adjectival law whilst s. 49A is a special provision enacted in a special statute. "Where a special provision is made in a special statute that special provision excludes the operation of a general provision in the general law - generalibus specialia derogant: *PP v. Chu Beow Hin* [1982] CLJ 110; [1982] CLJ (Rep) 288. Therefore, the operation of specific provision of s. 49A prevails over the general provisions of s. 407.

[9] The order for forfeiture is ordinarily an additional penalty. It is a harsh punishment. In *Ngeranter Ripai v. PP* [1990] 2 CLJ 273; [1990] 2 CLJ (Rep) 530. Chong Siew Fai J as follows:

> Forfeiture imposes a severe and harsh penalty on subjects, sometimes even on innocent subjects. Therefore, forfeiture provisions must be strictly construed and applied.

[10] In *Ngeranter Ripai*'s case, *supra*, the appellant was charged with an offence of being a driver of a motor vehicle, SC 7334, used the said vehicle as a public service vehicle without a valid licence contrary to s. 33 of the Commercial Vehicle Licensing Board Act, 1987.

[11] The appellant pleaded guilty and was convicted and fined RM700 in default one month's imprisonment. The motor vehicle was forfeited.

[12] In his appeal against the seizure of the motor vehicle, the appellant argued that there was no evidence that the motor vehicle had been properly seized and the motor vehicle therefore should not have been forfeited.

[13] The relevant provisions for the court consideration were sub-section (1) and (3) of s. 51 of the Act.

> 51(1) Any motor vehicle in respect of which there has been or there is reasonable cause to suspect that there has been committed any offence against s. 33 or 34 may be seized by any road transport officer or any police officer not below the rank of Inspector at any place.
>
> (2) ...
>
> (3) An order for the forfeiture or for the release of any motor vehicle seized under subsection (1) shall be made by the Court before which the prosecution with regard thereto has been held, and an order for the forfeiture of such vehicle shall be made if it is proved to the

A satisfaction of the Court that an offence against s. 33 or 34 has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence.

B **[14]** The order for forfeiture of the motor vehicle was set aside for reasons stated by Chong Siew Fai J (as the then was) as follows:

> Section 52 of the Act does not provide power of seizure. Moreover, the facts given by the prosecution do not disclose that
C the motor vehicle in question had been seized by officer or officers authorised under s. 51(1) of the Act. Since neither the statement of facts nor any evidence establishes that the motor vehicle had been properly seized, the order of forfeiture is bad must be set aside.

D **[15]** I do not agree with the learned deputy's argument in this case as the seizure and detention of the said motorcar, WFN 7409 was not carried out by the Director General or any senior immigration officer authorized by the Director General in writing under s. 49A(1), but instead by the police sergeant, Roslan bin
E Mansor. There was a clear non-compliance of the seizure provision of s. 49A(1). Any order of forfeiture, would clearly be against the rules of strict or restrictive construction of s. 49A(1) and therefore, bad in law.

F **[16]** The learned deputy also argued that by virtue of the presence of the word 'shall' in sub-s. (5), it is mandatory for the court to make the forfeiture order once it was proved that the vehicle was used in the commission of an offence under the Immigration Act. Sub-section (5) is dealing with an order for
G forfeiture or for the release of any vehicle, notwithstanding that no person may have been convicted of the offence. The word "shall" in sub-s. (5) need not necessarily mean that forfeiture must be made in all cases because an option or an alternative order for the release of the vehicle is also available to the court. Thus, to say
H that only the order of forfeiture can be made is against the clear words of the statute.

[17] In this case, there was a conviction on one Iredzardy bin Mat Radzi. The appropriate forfeiture provision is provided in
I sub-s. (3) which used the phrase "shall be liable". It has been decided that such phrase "shall be liable" is not mandatory. It is

discretionary. In the case of *Leong Kok Huat v. PP* [1998] 4 CLJ 106, in construing s. 55D of the Immigration Act 1959/63, Abdul Kadir Musa J said:

> Lastly, the presence of the words "shall ... be liable to" in the aforesaid s. 55D gives the court a judicial discretion as to what should be regarded by the court as an appropriate sentence having judicially considered all the facts of a particular case; and that, is now a settled law. The words "liable to" was considered by Harun J (as he then was) on revision in the case of *PP v. Wahab* [1964] 1 LNS 150; [1964] 30 MLJ 265.
>
> His Lordship went on to say at p. 117 as follows:
>
> In fact, the words "shall be liable to" found in s. 55D of the Act 155 not only gives the court a complete judicial discretion to impose the there types of penalties provided thereto either in the "alternative" or "cumulatively", but, in appropriate cases, it does not prevent the court to invoke s. 294 of the CPC. For that, I am well supported by the case of *Jayanthan v. PP* [1973] 2 MLJ 68, where the words "shall be liable" found in s. 15(4) of the Prevention of Crime Ordinance 1959 ("the 1959 Ord.") were considered by the then Federal Court.

[18] Based on the above reason, and also the respondent in this case being an innocent party, I propose to adopt the approach propounded by Gopal Sri Ram, JCA (as he then was) in *Marathaeir Sangulullai & Anor v. Syarikat JG Containers (M) Sdn Bhd & Anor* [2003] 2 CLJ 96.

> Hence, the primary approach of a court to all written law is to act upon the presumption that parliament does not intend an unfair or unjust result, that is to say, that it accords with the Rule of Law in art. 8(1). This is presumption of ancient repute that finds its origins in the context of retrospective legislation. But is of wider amplitude and of general application.

[19] As the seizure and detention of the motorcar, WFN 7409 is not in accordance with the provision in s. 49A(1) and improper, there can be no forfeiture order, as to do so is clearly bad in law. The said motorcar, in the circumstances of this, was rightly released by the learned magistrate to Ambank (M) Sdn Bhd, the respondent, who claimed ownership thereof.